



(Billing Code 5001-06)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 223 and 252

RIN 0750-AI07

**Defense Federal Acquisition Regulation Supplement: Storage,
Treatment, and Disposal of Toxic or Hazardous Materials—
Statutory Update (DFARS Case 2013-D013)**

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to conform with statute, amend the clause prescriptions, and update the basic and alternate clause for the prohibition on storage, treatment, and disposal of toxic or hazardous materials.

DATES: Effective [Insert date of publication in the **FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Ms. Lee Renna, telephone 571-372-6095.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 79 FR 4648 on January 29, 2014, to amend DFARS subpart 223.71 and the

associated clause 252.223-7006, Prohibition on Storage, Treatment, and Disposal of Toxic or Hazardous Materials. No public comments were submitted in response to the proposed rule.

II. Discussion and Analysis

This final rule amends DFARS subpart 223.71 to better align the DFARS with the current provisions set forth in 10 U.S.C. 2692 concerning storage, treatment, and disposal of nondefense toxic and hazardous materials. Additionally, the contract clause at 252.223-7006 is reformatted to facilitate the use of automated contract writing systems for clauses with alternates.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., and is summarized as follows:

This final rule amends the Defense Federal Acquisition Regulation Supplement (DFARS) to conform the DFARS with the statute (10 U.S.C. 2692) regarding the storage, treatment, or disposal of toxic or hazardous materials not owned by DoD on DoD installations. The rule also applies the new paradigm for clauses with alternates to facilitate the use of automated contract writing systems.

No comments were received from the public in response to the initial regulatory flexibility analysis.

This rule affects contractors and subcontractors performing contracts that involve the storage, treatment, or disposal of toxic or hazardous materials not owned by DoD on a DoD installation. The Federal Procurement Data System does not provide identification of how many contractors and subcontractors (whether large or small) may be affected.

This rule does not add any new information collection, reporting, or record keeping requirements. No alternatives were identified that will accomplish the objectives of the rule.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 223 and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 223 and 252 are amended as follows:

1. The authority citation for parts 223 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

**PART 223—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE
ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE
WORKPLACE**

2. Revise subpart 223.71 to read as follows:

**Subpart 223.71—Storage, Treatment, and Disposal of Toxic or
Hazardous Materials**

Sec.

223.7101 Definitions.

223.7102 Policy.

223.7103 Procedures.

223.7104 Exceptions.

223.7105 Reimbursement.

223.7106 Contract clause.

**SUBPART 223.71—STORAGE, TREATMENT, AND DISPOSAL OF TOXIC OR
HAZARDOUS MATERIALS**

223.7101 Definitions.

As used in this subpart, the terms storage and toxic or hazardous materials are defined in the clause at 252.223-7006, Prohibition on Storage, Treatment, and Disposal of Toxic or Hazardous Materials.

223.7102 Policy.

(a) 10 U.S.C. 2692 prohibits storage, treatment, or disposal on DoD installations of toxic or hazardous materials that are not owned either by DoD or by a member of the armed forces (or a dependent of the member) assigned to or provided military housing on the installation, unless an exception in 223.7104 applies

(b) When storage of toxic or hazardous materials is authorized based on an imminent danger, the storage provided shall be temporary and shall cease once the imminent danger no longer exists. In all other cases of storage or disposal, the storage or disposal shall be terminated as determined by the Secretary of Defense.

223.7103 Procedures.

(a)(1) Storage, treatment, or disposal of toxic or hazardous materials not owned by DoD on a DoD installation is prohibited unless—

(i) One or more of the exceptions set forth in 223.7104(a) is met including requisite approvals; or

(ii) Secretary of Defense authorization is obtained under the conditions set forth in 223.7104(b).

(2) When storage, treatment, or disposal of toxic or hazardous materials not owned by DoD is authorized in accordance with this subpart, the contract shall specify the types and quantities of toxic or hazardous materials that may be temporarily stored, treated, or disposed of in connection with the contract or as a result of the authorized use of a DoD facility or space launch facility. All solicitations and contracts shall specify the conditions under which storage, treatment, or disposal is authorized.

(b) If the contracting officer is uncertain as to whether particular activities are prohibited or fall under one of the exceptions in 223.7104, the contracting officer should seek advice from the cognizant office of counsel.

223.7104 Exceptions.

(a) The prohibition of 10 U.S.C. 2692 does not apply to any of the following:

(1) The storage, treatment, or disposal of materials that will be or have been used in connection with an activity of DoD or in connection with a service to be performed on a DoD installation for the benefit of DoD.

(2) The storage of strategic and critical materials in the National Defense Stockpile under an agreement for such storage with the Administrator of General Services Administration.

(3) The temporary storage or disposal of explosives in order to protect the public or to assist agencies responsible for Federal, State, or local law enforcement in storing or disposing of explosives when no alternative solution is available, if such storage or disposal is made in accordance with an agreement between the Secretary of Defense and the head of the Federal, State, or local agency concerned.

(4) The temporary storage or disposal of explosives in order to provide emergency lifesaving assistance to civil authorities.

(5) The disposal of excess explosives produced under a DoD contract, if the head of the military department concerned determines, in each case, that an alternative feasible means of disposal is not available to the contractor, taking into consideration public safety, available resources of the contractor, and national defense production requirements.

(6) The temporary storage of nuclear materials or nonnuclear classified materials in accordance with an agreement with the Secretary of Energy.

(7) The storage of materials that constitute military resources intended to be used during peacetime civil emergencies in accordance with applicable DoD regulations.

(8) The temporary storage of materials of other Federal agencies in order to provide assistance and refuge for commercial carriers of such material during a transportation emergency.

(9) The storage of any material that is not owned by DoD, if the Secretary of the military department concerned determines that the material is required or generated in connection with the authorized and compatible use of a facility of DoD, including the use of such a facility for testing material or training personnel.

(10) The treatment and disposal of any toxic or hazardous materials not owned by DoD, if the Secretary of the military department concerned determines that the material is required or generated in connection with the authorized and compatible use of a facility of that military department and the Secretary enters into a contract or agreement with the prospective user that—

(i) Is consistent with the best interest of national defense and environmental security; and

(ii) Provides for the prospective user's continued financial and environmental responsibility and liability with regard to the material.

(11) The storage of any material that is not owned by DoD if the Secretary of the military department concerned determines that the material is required or generated in connection with the use of a space launch facility located on a DoD installation or on other land controlled by the United States.

(b) The Secretary of Defense may grant an exception to the prohibition in 10 U.S.C. 2692 when essential to protect the health and safety of the public from imminent danger if the Secretary otherwise determines the exception is essential and if the storage or disposal authorized does not compete with private enterprise.

223.7105 Reimbursement.

The Secretary of Defense may assess a charge for any storage or disposal provided under this subpart. If a charge is to be assessed, then such assessment shall be identified in the contract with payment to the Government on a reimbursable cost basis.

223.7106 Contract clause.

Use the basic or the alternate of the clause at 252.223-7006, Prohibition on Storage, Treatment, and Disposal of Toxic or Hazardous Materials, in all solicitations and contracts which require, may require, or permit contractor access to a DoD installation.

(a) Use the basic clause, unless a determination is made under 223.7104(a)(10).

(b) Use the alternate I clause when the Secretary of the military department issues a determination under the exception at 223.7104(a)(10).

PART 252-SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Section 252.223-7006 is revised to read as follows:

252.223-7006 Prohibition on Storage, Treatment, and Disposal of Toxic or Hazardous Materials.

As prescribed in 223.7106, use the basic clause or its alternate:

Basic. As prescribed at 223.7106(a), use the following clause.

PROHIBITION ON STORAGE, TREATMENT, AND DISPOSAL OF TOXIC OR HAZARDOUS MATERIALS-BASIC (SEP 2014)

(a) Definitions. As used in this clause—

Storage means a non-transitory, semi-permanent or permanent holding, placement, or leaving of material. It does not include a temporary accumulation of a limited quantity of a material used in or a waste generated or resulting from authorized activities, such as servicing, maintenance, or repair of Department of Defense (DoD) items, equipment, or facilities.

Toxic or hazardous materials means—

(i) Materials referred to in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 (42 U.S.C. 9601(14)) and materials designated under section 102 of CERCLA (42 U.S.C. 9602) (40 CFR Part 302);

(ii) Materials that are of an explosive, flammable, or pyrotechnic nature; or

(iii) Materials otherwise identified by the Secretary of Defense as specified in DoD regulations.

(b) In accordance with 10 U.S.C. 2692, the Contractor is prohibited from storing, treating, or disposing of toxic or hazardous materials not owned by DoD on a DoD installation, except to the extent authorized by a statutory exception to 10 U.S.C. 2692 or as authorized by the Secretary of Defense. A charge may be assessed for any storage or disposal authorized under any of the exceptions to 10 U.S.C. 2692. If a charge is to be assessed, then such assessment shall be identified elsewhere in the contract with payment to the Government on a reimbursable cost basis.

(c) The Contractor shall include the substance of this clause, including this paragraph (c), in all subcontracts that require, may require, or permit a subcontractor access to a DoD installation, at any subcontract tier.

(End of clause)

Alternate I. As prescribed in 223.7106(b), use the following clause, which adds a new paragraph (c) and revises and redesignates paragraph (c) of the basic clause as paragraph (d).

PROHIBITION ON STORAGE, TREATMENT, AND DISPOSAL OF TOXIC OR
HAZARDOUS MATERIALS—ALTERNATE I (SEP 2014)

(a) Definitions. As used in this clause—

Storage means a non-transitory, semi-permanent or permanent holding, placement, or leaving of material. It does not include a temporary accumulation of a limited quantity of a material used in or a waste generated or resulting from authorized activities, such

as servicing, maintenance, or repair of Department of Defense (DoD) items, equipment, or facilities.

Toxic or hazardous materials means—

(i) Materials referred to in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 (42 U.S.C. 9601(14)) and materials designated under section 102 of CERCLA (42 U.S.C. 9602) (40 CFR Part 302);

(ii) Materials that are of an explosive, flammable, or pyrotechnic nature; or

(iii) Materials otherwise identified by the Secretary of Defense as specified in DoD regulations.

(b) In accordance with 10 U.S.C. 2692, the Contractor is prohibited from storing, treating, or disposing of toxic or hazardous materials not owned by DoD on a DoD installation, except to the extent authorized by a statutory exception to 10 U.S.C. 2692 or as authorized by the Secretary of Defense. A charge may be assessed for any storage or disposal authorized under any of the exceptions to 10 U.S.C. 2692. If a charge is to be assessed, then such assessment shall be identified elsewhere in the contract with payment to the Government on a reimbursable cost basis.

(c) With respect to treatment or disposal authorized pursuant to DFARS 223.7104(10) (10 U.S.C. 2692(b)(10)), and notwithstanding any other provision of the contract, the Contractor assumes all financial and environmental responsibility and liability resulting

from any treatment or disposal of toxic or hazardous materials not owned by DoD on a military installation. The Contractor shall indemnify, defend, and hold the Government harmless for all costs, liability, or penalties resulting from the Contractor's treatment or disposal of toxic or hazardous materials not owned by DoD on a military installation.

(d) The Contractor shall include the substance of this clause, including this paragraph (d), in all subcontracts that require, may require, or permit a subcontractor access to a DoD installation, at any tier. Inclusion of the substance of this clause in subcontracts does not relieve the prime Contractor of liability to the Government under paragraph (c) of this clause.

(End of clause)

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